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ERIC M. WICKHAM

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

ERIC M. WICKHAM, on behalf of himself,
all others similarly situated,

Plaintiff,

vs.

SCHENKER, INC., a New York company;
and DOES 1 through 50, inclusive,

Defendants.

Case No. 5:23-cv-00946-PCP

Assigned For All Purposes to the
Hon. P. Casey Pitts, Courtroom 8

**NOTICE OF MOTION AND RENEWED
MOTION FOR PRELIMINARY
APPROVAL OF CLASS ACTION
SETTLEMENT; MEMORANDUM OF
POINTS AND AUTHORITIES;
DECLARATION OF SHAUN SETAREH
IN SUPPORT THEREOF;
DECLARATION OF DENISE ISLAS;
[PROPOSED] ORDER**

Date: September 04, 2025

Time: 10:00 a.m.

Place: Courtroom 8

TO ALL PARTIES HEREIN AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on September 04, 2025 at 10:00 a.m., or as soon thereafter as the matter may be heard in Courtroom 10 of this Court, located at 280 South First Street, San Jose, CA 95113, Plaintiff Eric Wickham, on behalf of himself and all others similarly situated and the general public (“Plaintiff”), seeks an order that this case be certified as a class action for the purposes of settlement under Federal Rule of Civil Procedure (“Rule”) 23, on behalf of a settlement class comprised of Plaintiff and all other persons similarly situated, for an order directing notice to the class, and for a scheduling order setting a Fairness Hearing for final approval of the proposed settlement.

This motion is based upon this Notice, the accompanying Memorandum of Points and Authorities, the Declaration of Shaun Setareh, and all documents and arguments in support thereof.

Plaintiff requests the following relief:

1. Preliminary approval of the Stipulation of Class Action and Representative Action Settlement and Release, (“Settlement”) attached as Exhibit 1 to the Declaration of Shaun Setareh (“Setareh Decl.”), and all related notice and other deadlines as set forth in the agreement or as otherwise ordered by the Court subject to the terms and conditions of the agreement so that Plaintiff may then move the Court for Final Approval of the Settlement Agreement;

2. Conditional certification of the Settlement Class as defined in the Settlement;

3. The appointment of Shaun Setareh, and Brian Louis of Setareh Law Group as Settlement Class Counsel;

4. The appointment of Plaintiff Eric M. Wickham as the Class Representative;

5. An Order directing the dissemination of the notice of class action settlement to the Settlement Class, via United States First-Class Mail as proscribed by the Settlement;

6. Appointment of Simpluris, Inc., as the Settlement Administrator;

7. An Order setting a schedule for the dissemination of notice to the Settlement Class; deadlines for Settlement Class Members to opt-out or object to the Settlement; and for a Fairness

1 Hearing to address final approval of the Class Action Settlement Agreement following the notice
2 period.

3 8. Any other relief that the Court deems just and equitable under the circumstances.
4

5 DATED: August 06, 2025

SETAREH LAW GROUP

6
7 /s/ Shaun Setareh

SHAUN SETAREH

BRIAN LOUIS

Attorneys for Plaintiff

ERIC M. WICKHAM
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1 **I. INTRODUCTION**

2 Plaintiff ERIC WICKHAM (“Plaintiff”) respectfully requests that this Court conditionally
3 certify the below-defined Settlement Class for settlement purposes pursuant to Federal Rules of
4 Civil Procedure Rule 23, preliminarily approve the Stipulation of Class Action Settlement
5 Agreement (the “Settlement”)¹ with Defendant SCHENKER, INC., (“Defendant”), direct that
6 notice be disseminated to class members, and schedule a final fairness and approval hearing.

7 The Settlement provides for a Gross Settlement Amount (“GSA”) of \$1,275,000 to be paid
8 by Defendant in compromise of the disputed claim in this action for alleged violation of the Fair
9 Credit Reporting Act (“FCRA”), 15 U.S.C. §§ 1681, *et seq.*, in connection with the pre-
10 employment background checks allegedly conducted on Plaintiff and the class by Defendant. The
11 GSA represents approximately 43% of the value of the amount to be paid to the class if liability
12 could be proven at trial and the expected minimum penalty was awarded (and 4.3% of the
13 *maximum* possible penalty under the FCRA). There are approximately 29,628 Class Members.
14 (Declaration of Shaun Setareh (“Setareh Decl.”) ¶ 11, Ex. 1 – Settlement, ¶ 15.) On a *gross* basis,
15 each Class Member would receive approximately \$43.03 [$\$1,275,000 \div 29,628 = \43.03], and the
16 actual estimated average payment to each Class Member is \$25.16. Class counsel has zealously
17 represented Plaintiff and obtained an excellent recovery for the Class. As explained fully herein,
18 the Settlement is a fair, adequate, and reasonable compromise of the disputed claims asserted in
19 this action, and this Court should preliminarily approve the Settlement.

20 Plaintiff pursues the claims on behalf of a “Settlement Class” (or “Class”) defined in the
21 Settlement as: “all persons residing in the United States who applied for a position with Defendant
22 described by 15 U.S.C. § 1681b(b)(2)(C) between November 20, 2014 and February 28, 2022 and
23 about whom Defendant procured a consumer report.” Settlement, ¶ 1.5. The “FCRA Class
24 Period” (or “Class Period”) is the period from “November 20, 2014 and February 28, 2022.”
25 Settlement, ¶ 1.8. The Net Settlement Amount (“NSA”) is defined as the amount remaining in the
26

27 ¹ A fully executed copy of the Settlement is attached as **Exhibit 1** to the Declaration of Shaun
28 Setareh filed concurrently herewith in support of this Motion.

1 GSA after the following deductions are made: 1) Class Representative Service Award of \$7,500 to
 2 Plaintiff; 2) Administrative Costs estimated to be up to \$73,000.00; and 4) Class Counsel Award
 3 of one-third (1/3) of the GSA (i.e., \$425,000.00) in fees and litigation costs actually incurred up to
 4 \$24,000. *Id.*, ¶¶ 1.21, 3.2-3.4.

5 The GSA of \$1,275,000 is an excellent result for the class that equals or surpasses recent
 6 FCRA settlements involving allegedly unlawful disclosure forms.

7 No Class Member will have to make a claim in order to recover. Settlement, ¶ 3.5. Instead,
 8 Class Members will be mailed their share of the settlement directly. *Id.*, ¶ 7.2. Funds represented
 9 by Individual Settlement Payment checks returned as undeliverable and Individual Settlement
 10 Payment checks remaining un-cashed for more than 180 days after issuance will be tendered to the
 11 Electronic Privacy Information Center, a non-profit consumer privacy organization focused on
 12 bringing public attention to emerging privacy and civil liberties issues across the United States.
 13 *Id.*, ¶ 7.5; *see* <https://epic.org/about/non-profit/>.

14 In order to arrive at this Settlement, Plaintiff engaged in arm's-length negotiations with
 15 Defendant, including a day-long mediation session on or around November 4, 2024 with Hunter
 16 Hughes, Esq. At and after the mediation session, the Parties extensively discussed their views of
 17 the strengths and weaknesses of the case including the merits and risks. Setareh Decl., ¶ 10.
 18 Defendant has mounted several defenses to Plaintiff's claims, both on the merits and with regard
 19 to class certification. Thus, although Plaintiff was prepared to litigate this case through class
 20 certification and ultimately to trial, there were risks in going forward with litigation, and the
 21 Settlement represents a fair, adequate, and reasonable compromise in view of those risks. It
 22 guarantees a generous recovery for the Class commensurate with the likely recovery at trial should
 23 liability be established and is plainly within the range of reasonableness for preliminary approval
 24 while avoiding the expense and uncertainty of litigation. Accordingly, the Court should grant
 25 preliminary approval and order that notice be sent to the Class.

26 **II. STATEMENT OF FACTS AND PROCEDURAL HISTORY**

27 **A. PLEADINGS AND MATERIAL ALLEGATIONS**

1 On November 20, 2019, Plaintiff Michelle Orpilla filed a putative nationwide class action
 2 Complaint in the Superior Court of California, County of Santa Clara. On August 18, 2021, a First
 3 Amended Complaint was filed, naming Eric M. Wickham, as the new Plaintiff, captioned
 4 Wickham v. Schenker, Inc. Thereafter, Plaintiff ERIC M. WICKHAM filed a Second Amended
 5 Complaint was filed on March 2, 2023. On March 3, 2023, Defendant removed the Complaint to
 6 federal court in the Northern District of California. Plaintiff's Complaint asserts a claim for a
 7 violation of 15 U.S.C. § 1681b(b)(2)(A) of the Fair Credit Reporting Act. If the case proceeded,
 8 Plaintiff may also have alleged violations of California's Investigative Consumer Reporting
 9 Agencies Act, Cal. Civ. Code § 1786, et seq. ("ICRAA"), California's Consumer Credit Reporting
 10 Agencies Act, Cal. Civ. Code § 1785, et seq. ("CCRAA"), and California's Unfair Competition
 11 Law, Cal. Bus. & Prof. Code § 17200 et seq. ("UCL"), based on the allegations in the Complaint.
 12 Settlement, ¶ 2.1; Setareh Decl. ¶ 4.

13 Defendant denies (1) all material allegations in the Action, (2) that they violated any applicable
 14 laws, (3) that they are liable for damages, penalties, interest, restitution, attorneys' fees or costs, or for
 15 any other compensation or remedy with respect to anyone on account of the claims asserted in the
 16 Action, and (4) that class certification is appropriate as to any claim or proposed class in the Action.
 17 Defendant contends that their policies, procedures, and practices comply with all applicable laws
 18 asserted or that could have been asserted in the Action. Nonetheless, without admitting any liability or
 19 wrongdoing whatsoever and without admitting that class certification is appropriate for any purpose
 20 other than for settlement purposes alone, Defendant have agreed to settle the Action on the terms set
 21 forth in this Agreement, to avoid the burden, expense, and uncertainty of litigation. Any statements by
 22 Defendant in this Agreement are made for settlement purposes only.

23 **B. SUMMARY OF RELEVANT LAW**

24 **1. The Fair Credit Reporting Act ("FCRA")**

25 The FCRA, 15 U.S.C. section 1681b(b), requires employers to use certain documents and to
 26 follow specified policies and practices when they obtain "consumer reports" to assess the
 27 qualifications of prospective and current employees.

28 Pursuant to section 1681b(b) of the FCRA, no person can obtain a consumer report for

1 employment purposes without providing a “clear and conspicuous disclosure . . . in a document that
 2 consists solely of the disclosure.” 15 U.S.C. § 1681b(b)(2)(A)(i). The person obtaining the consumer
 3 report must also obtain the consumer’s written authorization which can be done as part of the
 4 disclosure form. 15 U.S.C. § 1681b(b)(2)(A)(ii). A plaintiff may be entitled to statutory and punitive
 5 damages when a defendant has willfully violated the provisions of the FCRA. 15 U.S.C. §
 6 1681n(a)(1)(A): “any person who willfully fails to comply with any requirement imposed under this
 7 subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of . .
 8 . damages of not less than \$100 and not more than \$1000 . . . [and] such amount of punitive damages
 9 as the court may allow.”

10 **2. The Landmark Syed Decision**

11 In 2017, the Ninth Circuit issued a major decision on the issue of violation of the standalone
 12 disclosure requirement of the FCRA. *Syed v. M-I, LLC* (9th Cir. 2017) 853 F.3d 492. In *Syed*, the
 13 FCRA disclosure contained a term purporting to waive any liability of the employer related to the
 14 background check. *Id.* at 498. The Ninth Circuit held that under the plain language of the FCRA the
 15 required disclosure must be in “a document that consists solely of the disclosure” and that the inclusion
 16 of the liability release was impermissible: “We must begin with the text of the statute. Where
 17 congressional intent has been expressed in reasonably plain terms, that language must ordinarily be
 18 regarded as conclusive The ordinary meaning of ‘solely’ is ‘[a]lone; singly’ or entirely
 19 exclusively.” *Id.* at 500. The Ninth Circuit also held that due to the clarity of the statutory language
 20 requiring that the disclosure be in a document consisting “solely” of the disclosure: “a prospective
 21 employer’s violation of the FCRA is “willful” when the employer includes terms in addition to the
 22 disclosure.” *Id.* at 496.

23 While *Syed* involved a liability release, Plaintiff contends its holding is broader. *Syed* broadly
 24 analyzed the “solely” requirement governing the disclosure apart from any release language:

25 “It is our duty to give effect, if possible, to every clause and word of a statute.” *United*
 26 *States v. Menasche*, 348 U.S. 528, 538–39, 75 S.Ct. 513, 99 L.Ed. 615 (1955) (internal
 27 quotation marks omitted). M-I’s interpretation fails to give effect to the term “solely,”
 28 violating the precept that “statutes should not be construed to make surplusage of any
 provision.” *Wilshire Westwood Assocs. v. Atl. Richfield Corp.*, 881 F.2d 801, 804 (9th
 Cir. 1989) (alterations and internal quotation marks omitted). ***That other FCRA***
provisions mandating disclosure omit the term “solely” is further evidence that

1 *Congress intended that term to carry meaning in 15 U.S.C. § 1681b(b)(2)(A)(i). See*
 2 15 U.S.C. §§ 1681d, 1681s-3.

3 *Syed*, 853 F.3d at 501 (emphasis added).

4 Put in simplest terms, “solely” means just what it appears to mean, and, in Plaintiff’s view *no*
 5 implied exceptions to the “solely” requirement should be judicially added to the *one* express exception
 6 allowing the authorization to accompany the correct disclosure. The FCRA expressly states that the
 7 *sole* additional element that may be included with the disclosure is an authorization, “which
 8 authorization may be made on the document referred to in clause (i). . . .” 15 U.S.C. §
 9 1681b(b)(2)(A)(ii).

10 The United States Court of Appeals for the Ninth Circuit has found that a background check
 11 disclosure document that Plaintiff contends is similar to the one here did not comply with the FCRA
 12 standalone document requirement and was not clear. *Gilberg v. California Check Cashing Stores, LLC*
 13 (9th Cir. 2019) 913 F.3d 1169.² The form in *Gilberg* included references “extraneous information,”
 14 including rights under various states’ law and to a separate document containing a summary of rights,
 15 as Plaintiff alleges regarding the forms here. *Id.*, at 1175-1176.

16 **C. THE DISCLOSURE FORMS AT ISSUE**

17 In Plaintiff’s view, the disclosure forms utilized by Defendant during the Class Period fall far
 18 short of meeting the standards set forth in *Syed* and *Gilberg*. Plaintiff contends that the forms are
 19 replete with extraneous information, including but not limited to notices about various state law rights,
 20 and any consent or authorization obtained by Defendant from its employment applicants to have
 21 background check reports procured with respect to them were obtained in violation of the FCRA in
 22 failing to meet those standards. Defendant, however, has disagreed that its disclosure forms violated
 23 the FCRA, that it obtained any consumer reports without valid consent, and that it acted willfully with
 24 respect to any alleged violation of the FCRA, as discussed below.

25 **D. DISCOVERY**

26
 27
 28 ² Setareh Law Group is lead counsel in *Gilberg v. California Check Cashing Stores, Inc.*

1 Through substantial and extensive formal and informal discovery, Defendant provided
 2 Plaintiff's counsel with documents necessary to investigate the claims of the class. In particular,
 3 Defendant produced the background check disclosure used during the Class Period in formal
 4 discovery, presented information regarding the alleged statute of limitations defense, and
 5 confirmed the applicable estimated class size through extensive data analysis. The Parties agree
 6 that the foregoing exchange of information and evaluation are sufficient to assess the merits of the
 7 respective Parties' position. Settlement, ¶ 2.4; Setareh Decl. ¶ 5.

8 Prior to settlement, and pursuant to a Motion to Compel granted in state court, Plaintiff
 9 obtained class contact information, all applicable authorization and disclosure forms utilized
 10 during the class period, as well as the number of class members who were provided each form in
 11 use during the class period. *Id.* ¶ 6.

12 **E. THE PARTIES' MEDIATION EFFORTS**

13 On November 4, 2024, the Parties attended a full-day mediation conducted by Hunter
 14 Hughes, Esq., a highly respected mediator with expertise in FCRA class actions, and were able to
 15 reach an agreement to resolve the claims released herein. *Id.*, ¶ 7; Settlement, ¶ 2.3.

16 **III. ADDRESSING THE COURT'S APRIL 11, 2025 ORDER DENYING MOTION FOR** 17 **PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT (DKT. 97)**

18 This Court previously identified several deficiencies in Plaintiff's Motion for Preliminary
 19 Approval. *See* Order Denying Motion for Preliminary Approval (the "Order"), dated April 11,
 20 2025.³ Specifically, the Court requested the parties resolve the following before filing a renewed
 21 motion for preliminary approval:

- 22 • Ambiguity regarding the scope of the release. Plaintiff addresses this in Section
 23 IV(B)(1).
- 24 • Finding that the proposed *cy pres* is impermissible. The parties have addressed this by
 25 amending the Settlement to include a new *cy pres*, Electronic Privacy Information

26
 27 ³ The Court additionally previously requested supplemental briefing on a number of issues (Dkt. 90).
 Plaintiff submitted supplemental briefing in support of his Motion for Preliminary Approval (Dkt. 95). For
 28 the Court's convenience, Plaintiff re-attaches this briefing as Exhibit 2 to the Declaration of Shaun Setareh.

Center (“EPIC”), which has been approved in similar consumer privacy cases, including FCRA cases. *See Mirfasihi v. Fleet Mortgage Corp.*, 2007 WL 2608778 (N.D. Ill. Sept. 6, 2007) *aff’d*, 551 F.3d 682 (7th Cir. 2008) (finding the *cy pres* distribution to EPIC “cause[d] an improvement in the settlement that provides additional benefits to the plaintiffs and to the community”); *see also Perkins v. LinkedIn Corp.*, No. 13-CV-04303, 2016 WL 613255, at *11, slip op. at 20-21 (N.D. Cal. Feb. 16, 2016) (“[t]he Court finds that EPIC’s receipt of other *cy pres* awards in privacy cases demonstrates that EPIC is well-suited to be a *cy pres* recipient in the instant privacy case. *See In re Google Buzz Privacy Litig.*, 2011 WL 7460099, at *1 (‘EPIC has demonstrated that it is a well-established and respected organization within the field of internet privacy.’)”). “The *cy pres* remedy must account for the nature of the plaintiffs’ lawsuit, the objectives of the underlying statutes, and the interests of the silent class members.” *Nachsin v. AOL LLC*, 663 F.3d 1034, 1036 (9th Cir. 2011) Here, that standard is met— EPIC benefits the members of the class here. Class Counsel does not have a relationship with the proposed *cy pres*. Setareh Decl. ¶ 41.

- Concerns regarding the conditional class certification of a nationwide class due to Article III standing issues. Plaintiff has addressed this in Section VIII(A)(7)-(8).
- Concerns about the attorneys fees requested and requested Plaintiff’s enhancement award. This will be more fully addressed in a future Motion for Attorneys’ Fees, which will provide additional support for Plaintiff’s requested enhancement award, as well as a lodestar from Plaintiff’s counsel. However, the Settlement provides the Court may reduce the requested Service Payment (Settlement, ¶ 1.31) with any reduction being reallocated to the Net Settlement Amount. The same is true for the requested attorneys’ fees (Settlement, ¶ 3.3). As such, preliminary approval should be granted, with these issues being addressed in a future Motion for Attorneys’ Fees filed on or around the same time as a Motion for Final Approval.

1 **IV. SUMMARY OF SETTLEMENT TERMS**

2 **A. MAXIMUM SETTLEMENT AMOUNT, ATTORNEY FEES AND COSTS,**
 3 **CLASS REPRESENTATIVE SERVICE AWARD AND PAGA**
 4 **ALLOCATION**

5 The Settlement Agreement provides for a Gross Settlement Amount (“GSA”) of
 6 \$1,275,000. Settlement, ¶ 3.1. That amount is the maximum Defendant will pay unless the
 7 Escalation Clause in paragraph 3.1.1 is triggered.

8 Settlement checks will be mailed directly to class members unless they opt out. Settlement
 9 ¶ 7.2. After 180 days, there will be a second distribution of the residue from uncashed checks to Class
 10 Members who cashed their first check who will have 180 days to cash the second check. *Id.* ¶¶ 7.3-7.4.
 11 After 180 days from the second distribution, any remaining unclaimed funds will be distributed to the
 12 Electronic Privacy Information Center as a *cy pres* recipient. *Id.*, ¶ 7.5.

13 Subject to court approval, the following amounts will be deducted from the GSA: Class
 14 Counsel fees of \$425,000 (one-third of the GSA) and costs of up to \$24,000, settlement administration
 15 costs estimated to be \$73,000, and Plaintiff’s enhancement award of \$7,500. *Id.*, ¶¶ 3.2-3.4. The
 16 amount left over after these deductions is the Net Settlement Fund. *Id.*, ¶ 1.21.

17 Any amounts for attorney fees, expenses, class representative service payment, or PAGA
 18 allocation not approved by the Court will be reallocated to the Net Settlement Fund. *Id.*, ¶¶ 1.31,
 19 3.2, 3.3.

20 **B. CLASS AND PLAINTIFF RELEASES**

21 The Class Period is November 20, 2014 and February 28, 2022. Settlement, ¶ 1.5. The
 22 Settlement Class is “all persons residing in the United States who applied for a position with
 23 Defendant described by 15 U.S.C. § 1681b(b)(2)(C) between November 20, 2014 and February
 24 28, 2022 and about whom Defendant procured a consumer report.” *Id.*

25 The Settlement Class Members shall release:

26 [A]ll claims of any and every kind arising in whole or in part from or in any way
 27 related to Defendant’s procurement of consumer reports or investigative
 28 consumer reports for employment purposes, regarding Plaintiff and such Class
 Members, up to and including the date of entry of the order for Preliminary
 Approval, including all claims brought or that could have been brought under the
 Fair Credit Reporting Act for statutory, actual and punitive damages, all state
 equivalent laws (including but not limited to the California Investigative

Consumer Reporting Agencies Act and California Credit Reporting Agencies Act (California Civil Code § 1786 et seq. and 1785 et seq., respectively)), express or implied breach of contract, tort, equity, unfair competition, or any other type of claim based on any federal, state or municipal statute, law, ordinance or regulation. The Class Members also shall waive any right to pursue in any forum any such claims on a class or collective action basis of any kind, including any mass action. The Parties' settlement agreement shall expressly prohibit any attempt to submit opt outs from the Settlement on behalf of any group of individuals (commonly known as "mass opt outs"). Opt outs shall be valid only if submitted for or on behalf of a single individual. This release includes a waiver of California Civil Code § 1542 and like laws in other jurisdictions, and thus releases all known and unknown claims arising from or related to the facts and claims alleged or that could have been alleged in the Complaint. Settlement, ¶ 4.1.

Each Class Member's Individual Settlement Share will be based on dividing the Net Settlement Amount, the numerator, and the denominator of which is the total number of Settlement Class Members whom have not opted out of the settlement. Settlement, ¶¶ 1.18, 1.21, 5.2.2.

1. The Release is Reasonable and Should be Approved

The Court additionally had concerns regarding the scope and ambiguity of the release. The Settlement includes a release of all claims by Settlement Class Members arising out of the claims alleged up through the date of entry of the order of Preliminary Approval. Settlement, ¶ 4.1. The release is reasonably tailored to the claims presented in the case, as it is based on claims that arise out of the identical factual predicate as the underlying claims settled, the procurement of consumer reports or investigative consumer reports for employment purposes. *Hesse v. Sprint Corp.*, 598 F.3d 581, 590 (9th Cir. 2010) ("A settlement agreement may preclude a party from bringing a related claim in the future 'even though the claim was not presented and might not have been presentable in the class action,' but only where the released claim is 'based on the identical factual predicate as that underlying the claims in the settled class action.' *Williams v. Boeing Co.*, 517 F.3d 1120, 1133 (9th Cir. 2008).) The release period is similarly narrow in scope, only covering up through the date of the entry of the order for Preliminary Approval. Settlement, ¶ 4.1. Given notice will be sent following the entry of the Preliminary Approval order, Class Members will be given the opportunity to evaluate whether or not to exclude themselves from the Settlement should they wish to pursue their claims instead of releasing them. As such, the release is reasonable, Class

1 Members will be provided adequate notice and have an opportunity to exclude themselves from
 2 the Settlement, and the release should be approved.

3 **C. SETTLEMENT ADMINISTRATION AND NOTICE**

4 No claim form will be required to receive a Settlement Payment. Settlement, ¶ 3.5. Each
 5 Settlement Class Member will be e-mailed the Settlement Notice, or for those without e-mail
 6 addresses or whom for which e-mail delivery fails, the Settlement Administrator will mail the
 7 Notice using U.S. First class Mail. *Id.* ¶ 5.2.3. Class Members will have 60 days from the date of
 8 mailing the Settlement Notice to submit a Request for Exclusion or to object to the Settlement. *Id.*
 9 ¶ 5.3.1. To be valid, a Request for Exclusion must include the Class Member's name and
 10 signature, current address, current telephone number, the last four digits of the Class Member's
 11 Social Security number and statement affirming the Class Members wishes to opt out of the
 12 Settlement. *Id.* The Settlement Administrator shall not review or consider any Opt-Out Request
 13 postmarked after the Objection/Opt-Out Deadline. *Id.*

14 The Settlement Administrator will also establish the Settlement Website, which will
 15 include the stipulation of Settlement and a summary of the key settlement terms. *Id.* ¶ 5.3.1.

16 **D. DISPOSITION OF UNCASHED CHECKS AND RESERVE FUND**

17 Settlement Class Members will have 180 calendar days after mailing to cash their checks.
 18 Settlement ¶ 7.2. There will be a second distribution of the residue from uncashed checks to Class
 19 Members who cashed their first check who will have 180 days to cash the second check. *Id.*, ¶ 7.4.
 20 Any uncashed funds remaining after the second distribution will be sent to the Electronic Privacy
 21 Information Center. *Id.*, ¶ 7.5. The Electronic Privacy Information Center is a non-profit consumer
 22 privacy organization focused on bringing public attention to emerging privacy and civil liberties
 23 issues across the United States. *Id.*, ¶ 7.5; see <https://epic.org/about/non-profit/> Class Counsel does
 24 not have a relationship with the proposed cy pres. (Setareh Decl. ¶ 45.)

25 **V. LEGAL STANDARD FOR PRELIMINARY APPROVAL OF CLASS ACTION** 26 **SETTLEMENTS IN THE NORTHERN DISTRICT**

1 There is a “strong judicial policy that favors settlements, particularly where complex class
 2 action litigation is concerned.” *In re Syncor ERISA Litig.*, 516 F.3d 1095, 1101 (9th Cir. 2008)
 3 (citing *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992)).

4 Federal Rule of Civil Procedure 23(e) sets forth a multi-step process for determining
 5 whether a proposed class action settlement should be preliminarily approved by the Court. The
 6 parties must first “provide the court with information sufficient to enable it to determine whether
 7 to give notice of the proposal to the class.” Fed. R. Civ. Proc. 23(e)(1)(A). Then, “[t]he court must
 8 direct notice in a reasonable manner to all class members who would be bound by the proposal if
 9 giving notice is justified by the parties’ showing that the court will likely be able to: (i) approve
 10 the proposal under Rule 23(e)(2); and (ii) certify the class for purposes of judgment on the
 11 proposal.” Fed. R. Civ. Proc. 23(e)(1)(B). Federal Rule of Civil Procedure 23(e)(2), in turn,
 12 provides:

13 “If the proposal would bind class members, the court may approve it
 14 only after a hearing and only on finding that it is ***fair, reasonable,***
and adequate after considering whether:

15 (A) the class representatives and class counsel have
 adequately represented the class;

16 (B) the proposal was negotiated at arm's length;

17 (C) the relief provided for the class is adequate, taking into
 account:

18 (i) the costs, risks, and delay of trial and appeal;

19 (ii) the effectiveness of any proposed method of
 distributing relief to the class, including the method
 of processing class-member claims;

20 (iii) the terms of any proposed award of attorney's
 fees, including timing of payment; and

21 (iv) any agreement required to be identified under
 Rule 23(e)(3); and

22 (D) the proposal treats class members equitably relative to
 23 each other.”

24 *Id.* (emphasis added).

25 The Ninth Circuit Court of Appeals has identified eight factors district courts may also
 26 consider in evaluating the fairness and adequacy of a pending settlement: (1) the strength of the
 27 plaintiffs’ case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the
 28 risk of maintaining class action status throughout the trial; (4) the amount offered in settlement;

(5) the extent of discovery completed and the stage of the proceedings; (6) the experience and views of counsel; (7) the presence of a governmental participant; and (8) the reaction of the class members to the proposed settlement (“*Churchill Factors*”). *Churchill Vill., L.L.C. v. Gen. Elec.*, 361 F.3d 566, 575–76 (9th Cir. 2004). Factors 1-4 and 6 are duplicative of the Rule 23(e) factors. As to factor 5, as detailed herein there has been extensive discovery. Factor 7 is not applicable, and Factor 8 will be relevant upon final approval when the class will have had the opportunity to request exclusion or object.

As shown below, the settlement here meets the Rule 23(e) factors, as well as the Northern District’s Procedural Guidance on Class Action Settlements

VI. THE COURT SHOULD PRELIMINARILY APPROVE THE SETTLEMENT

BECAUSE IT IS “FAIR, REASONABLE AND ADEQUATE” UNDER RULE 23(e) (2) AND THE CHURCHILL FACTORS

A. Class Counsel and Plaintiff Adequately Represented the Class

Counsel representing the class must be qualified, experienced, and capable of conducting the litigation. *Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507, 512 (9th Cir. 1978). Here, Setareh Law Group is a highly experienced and skilled Plaintiff’s class action firm that worked efficiently and diligently to resolve the case. Setareh Decl. ¶¶ 4-12, 35-38. Attorneys dedicated many hours to this case. Setareh Decl. ¶ 39. Setareh Law Group has also incurred over \$24,000 in costs to prosecute the case. Setareh Decl. ¶ 41.

Class representatives are adequate where they have retained experienced counsel and have actively participated in the litigation. *See e.g. Norton v. LVNV Funding, LLC*, No. 18-CV-05051-DMR, 2021 WL 3129568, at *8 (N.D. Cal. July 23, 2021). Here, class representative Eric Wickham is dedicated to this case and spent substantial time and resources assisting Class Counsel throughout this litigation. Setareh Decl. ¶ 31.

B. THE PROPOSAL WAS NEGOTIATED AT ARM'S LENGTH

The proposed Settlement arises after a non-collusive mediation facilitated by a renowned mediator. *See* Fed. R. Civ. P. 23(e)(2)(B); *see also In re NVIDIA GPU Litig.*, 539 F. App’x 822, 825 (9th Cir. 2013).

1 **C. THE RELIEF PROVIDED FOR THE CLASS IS ADEQUATE**

2 The relief provided for the class is adequate, taking into account:

- 3 (i) the costs, risks, and delay of trial and appeal;
- 4 (ii) the effectiveness of any proposed method of distributing relief to the class,
- 5 including the method of processing class-member claims;
- 6 (iii) the terms of any proposed award of attorney's fees, including timing of
- 7 payment; and
- 8 (iv) any agreement required to be identified under Rule 23(e)(3)

9 *See* Fed. R. Civ. P. 23(e) (2)(C).

10 **1. The Relief for the Claims Are Adequate, Given the Costs, Risks, and**
11 **Delay of Trial and Appeal**

12 In addition to disputing the merits of Plaintiff's claims at trial, Defendant intended to

13 aggressively challenge Plaintiff's case at the certification stage and onward. Defendant believes

14 that Plaintiff would not prevail on his certification motion, while Plaintiff believes the case was

15 viable through to a trial. However, while Plaintiff asserts that this is a viable case for trial, he is

16 fully aware of the risks and complexity of the case. The uncertain legal landscape creates a substantial

17 risk of proceeding to certification and beyond. Even if Plaintiff were to prevail in certification, the

18 costs for both parties would mount. Further, given that there is potentially in excess of \$2,962,800.00

19 at issue (29,628 class members multiplied by at least \$100), although an award in that amount might

20 not be likely, the Parties could be expected to expend considerable resources litigating the matter.

21 Setareh Decl., ¶ 18.

22 There is the risk that this Court, a jury, or a reviewing court would find that Defendant's

23 conduct was not willful. The FCRA is not a strict liability statute. *Dalton v. Capital Associated Indus.*

24 (4th Cir. 2001) 257 F.3d 409, 417. A FCRA plaintiff can recover statutory damages only where the

25 defendant has acted willfully. 15 U.S.C. § 1681n(a)(1). Defendant contends that its conduct must

26 have been objectively unreasonable based on clearly established law at the time of the alleged

27 violation to be willful. *Safeco Ins. Co. of Am. v. Burr* (2007) 551 U.S. 47 ("a company subject to

28 FCRA does not act in reckless disregard of it unless the action is not only a violation under a

1 reasonable reading of the statute’s terms, but shows that the company ran a risk of violating the law
2 substantially greater than the risk associated with a reading that was merely careless.”). A finding of
3 a mere negligent violation would not permit Plaintiff or the putative class to obtain statutory damages,
4 and Plaintiff and class members who were hired likely could not seek actual damages – the only type
5 of damages available for a mere negligent violation. Setareh Decl., ¶ 18.

6 In addition, Defendant contends that Plaintiff has risk that the claim would be deemed to be
7 time-barred in whole or in part, a contention that creates risk on both class certification and the merits.
8 Furthermore, Defendant contends that Plaintiff could not show Article III standing for himself and the
9 putative class. Setareh Decl., ¶ 18.

10 Ultimately, in considering the risks of litigation, “a court may consider the vagaries of litigation
11 of immediate recovery by way of compromise to the mere possibility of relief, after protracted and
12 expensive litigation.” *Vasquez v. Coast Valley Roofing, Inc.* (E.D. Cal. 2010) 266 F.R.D. 482, 489
13 (internal quotations omitted). Here, the Settlement delivers immediate recovery for all Settlement Class
14 Members and avoids the risks and expenses of protracted litigation, including potential interlocutory
15 appeals and an appeal after a trial. Setareh Decl., ¶ 18.

16 In light of these risks, as well as the hazards and expenses of carrying the case through trial,
17 Plaintiff’s counsel is of the opinion that the Settlement represents an excellent bargain for the Class. At
18 this juncture, the Settlement would entitle each Settlement Class Member to a significant recovery. In
19 contrast, if the case would continue in litigation, even if Plaintiff prevailed on a class certification
20 motion, any appeal by Defendant would prolong already protracted litigation and delay remedies to the
21 Class. Setareh Decl., ¶ 18.

22 To review, although Plaintiff feels confident in prevailing were litigation to continue through
23 class certification and ultimately trial, considerable risks, delays and uncertainties nevertheless exist
24 with continued litigation. The Parties have achieved a fair Settlement that reflects a meaningful
25 recovery for Settlement Class Members and that merits the Court’s preliminary approval. *Id.*

26 **2. The Proposed Method of Distributing Relief to the Class is Effective.**

27 The settlement provides that class members will be mailed checks directly and will not
28 need to submit a claim form. And for class members who do not cash their checks, the money will

1 be sent via a second distribution to those class members who cashed the first round of checks,
 2 ensuring a benefit to the class. Thereafter, any remaining residue will be sent to the *cy pres*, the
 3 Electronic Privacy Information Center.

4 **3. The Proposed Award of Attorney Fees is Fair.**

5 The Ninth Circuit “benchmark” for fees is 25% of the fund, but courts may award a higher
 6 percentage when merited. *See Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1048 (9th Cir. 2002).
 7 In appropriate cases, state and federal courts applying the percentage-of-recovery method
 8 frequently award 33- 1/3% of the common fund. *See, e.g., Chavez v. Netflix, Inc.*, 162 Cal. App.
 9 4th 43, 66 n.11 (2008) (empirical studies show that California fee awards generally average
 10 around one-third of the recovery).

11 Courts regularly apply a multiplier to the base lodestar to reflect the risks involved, the
 12 complexity of the litigation, the length of the case, and other relevant factors. *See Vizcaino*, 290
 13 F.3d at 1051 (courts “routinely enhance[] the lodestar to reflect the risk of non-payment in
 14 common fund cases”).

15 In addition to the evaluation of “awards made in similar cases”, the Court may consider (1)
 16 the results achieved; (2) the risk of litigation; (3) the skill required and the quality of the work; (4)
 17 the contingent nature of the fee and the financial burden carried by the Plaintiff. *See Vizcaino*
 18 *supra* at 1048-50.

19 The contemplated 33 1/3% fee award is extremely reasonable in light of the class
 20 benefiting from the substantial risk of the claims litigated, years of hard work, exceptional results,
 21 and over \$24,000 in out-of-pocket fees and expenses borne by the Plaintiff’s lawyers without any
 22 guarantees of ever recovering these sums.

23 Plaintiff’s Counsel have repeatedly shown their dedication to this case by tackling novel
 24 issues of law, devoting a substantial percentage of their resources, and committing to the long-
 25 term litigation of this action in the face of great opportunity costs.

26 The novelty and challenges presented by a class action, as well as the corresponding risk that
 27 the class members and class counsel will be paid no recovery or fee, is properly evaluated in
 28

1 connection with a fee motion. *See Serrano*, 20 Cal. 3d at 49; *accord Vizcaino*, 290 F.3d at 1050-51
2 (multiplier applied to lodestar cross-check reflects risk of non-recovery).

3 The second and third factors (i.e., “the risk of litigation”; and, the “skill required and the
4 quality of the work”, respectively) are largely intertwined. *In re Washington Public Power Supply*
5 *Sys. Sec. Litig.*, 19 F.3d at 1301 n.10.

6 Here, Class Counsel faced significant risk in pursuing this litigation that was only
7 overcome by their skill and experience in the field of wage & hour and consumer class actions.
8 *See Setareh Decl.*, at ¶¶ 36-38; 41-43.

9 Plaintiff’s Counsel also clearly faced substantial risks associated with certifying this class
10 action and prevailing at trial. These numerous risks faced by Counsel, coupled with their deft skill
11 in keeping this litigation on course towards trial until a settlement was reached, justify the 33.3%
12 award contemplated by the settlement agreement. *Fernandez v. Victoria Secret Stores, LLC*, No.
13 CV 06-04149 MMM SHX, 2008 WL 8150856, at *15 (C.D. Cal. July 21, 2008) (“Given the novel
14 legal issues raised, the court concludes that the circumstances warrant an award” of 34%).

15 The fourth factor (*i.e.* “the contingent nature of the fee and the financial burden carried by
16 the Plaintiffs) also clearly weighs in favor of the contemplated attorney fee 33.3% award. *In re*
17 *Quantum Health Resources, Inc.* 962 F. Supp. 1254, 1257 (1997). Here, Class Counsel undertook
18 all of the risks of this litigation on a contingent fee basis. *Setareh Decl.* ¶ 41. They also faced the
19 risks involved in litigating this case for years and spending thousands of dollars in costs, without
20 any guarantee of future pay or reimbursement.

21 In addition to these hard costs, Plaintiff’s Counsel committed many attorney hours to the
22 action. This includes but is not limited to propounding and responding to written discovery,
23 interviewing percipient witnesses, obtaining declarations from percipient witnesses, reviewing
24 documents produced by Defendant, working with Plaintiff’s expert, beginning to draft the motion
25 for class certification, drafting mediation briefs and preparing extensively for two mediations, and
26 monitoring other litigation involving Defendant with potentially overlapping claims.

27 Additionally, the number of attorneys and staff necessary to litigate this action constituted
28 a significant percentage of Plaintiff’s Counsel’s total workforce. *See Setareh Decl.* at ¶ 40. Again,

1 all of these important resources were willingly committed by Plaintiff's Counsel knowing that
2 they risked recovering nothing.

3 **D. Class Members Will Be Treated Equitably Relative to One Another**

4 Rule 23(e)(2)(D) requires a court to determine whether the "proposal treats class members
5 equitably relative to each other." For this factor, "[m]atters of concern could include whether the
6 apportionment of relief among class members takes appropriate account of differences among
7 their claims, and whether the scope of the release may affect class members in different ways that
8 bear on the apportionment of relief." Fed. R. Civ. P. 23(e)(2), 2018 Advisory Committee Notes.

9 Here, each Class Member receives an equal, *pro rata* amount based on each of them
10 having a consumer report procured by Defendant during the class period. Settlement, ¶ 3.5 Such a
11 distribution is inherently just, fair and reasonable.

12 **VII. THE NORTHERN DISTRICT'S PROCEDURAL GUIDANCE**

13 **A. INFORMATION ABOUT THE SETTLEMENT.**

14 **1. Differences Between the Settlement Class and the Class Proposed in the**
15 **Complaint.**

16 The Settlement Class is narrower in that the complaint class ends when judgment is entered
17 while the settlement class period ends on February 28, 2022. In reality, if a class was certified, the
18 class definition would only include applicants through the date of certification, and may even be
19 limited to certain disclosure forms in use throughout the Class Period. Additionally, during the
20 mediation, class counsel reviewed Defendant's current Consumer Report Disclosure Document,
21 which was included at the top of Page 61 of 95 in Doc. 62-1 filed in the Action, and Class Counsel
22 believes it complies with the FCRA, based on Defendant's representation that the Disclosure is
23 presented to applicants on its own page online. Setareh Decl. ¶ 42. Based on this, the Parties
24 limited the scope of the release to be the day before this form was used. *Id.*

25 **2. Differences in the Claims to be Released and the Claims Pled.**

26 The Settlement Agreement expressly releases claims under the California Investigative
27 Consumer Reporting Agencies Act and California Credit Reporting Agencies Act. Potential
28 claims under the ICRAA, covered by the Released Claims for the Settlement Class, are closely

related to, and cover the same subject matter as, Plaintiff's claim under the FCRA relating to Defendant's background check forms. Setareh Decl., ¶ 43. As a result, they would not contribute much in aggregate value on a class-wide basis and are difficult to prove. Furthermore, the plain language of the ICRAA makes clear that statutory damages are not available in a class action. Civ. Code § 1786.50(a). Finally, based on the text of the ICRAA statute, Defendant contends that class members can elect to recover under the FCRA or ICRAA, but not under both. Civ. Code §1786.52(b). For these reasons, Plaintiff has not ascribed any value to the ICRAA claim. Additionally, courts have supported Plaintiff's theory of limited value for the ICRAA claims, as noted in the context of reviewing proposed class action settlements in similar cases and concluding that potential recovery on state law background check claims is "quite limited". *See, e.g., In re Uber FCRA Litigation*, No. 14-CV-05200-EMC, 2017 WL 2806698, at *5 (N.D. Cal. June 29, 2017) (granting preliminary approval).

3. Other Cases Affected by the Settlement.

Defendant represents there are no currently pending class actions which allege the same causes of actions as the current action.

B. SETTLEMENT ADMINISTRATION

The Parties have selected Simpluris, Inc., as the Settlement Administrator in this case. Plaintiff obtained four bids from administrators Phoenix Class Action Administrators, ILYM Group, Apex Class Action Administrators, and Simpluris, Inc. Simpluris' bid was the most comprehensive and very competitive. In Class counsel, experience, Simpluris is a competent administrator who is responsive and diligent. Setareh Decl. ¶ 30-31. Simpluris is experienced and has security procedures in place. Declaration of Denise Islas ¶¶ 4-7, Ex. B. Simpluris has administered 30 cases with Setareh Law Group in the last 2 years. *Id.* ¶ 4. In Class Counsel's experience, Simpluris' bid of \$73,000 is reasonable given the size of the class. Setareh Decl., ¶ 31.

C. NOTICE.

The Notice of Settlement is Exhibit 1 to the settlement agreement. Consistent with section 3 of the Procedural Guidance, the Notice provides contact information for Class Counsel (p. 2); a website address for settlement class members to obtain further information and see key documents

(*Id.* at p. 7); the date and time of the final approval hearing with a statement that the date may change without further notice to the class (*Id.* at p. 1); and instructs class members to check the website to ensure the date and time of the final approval hearing have not changed. *Id.* at pp. 1, 7.

The Notice also uses the proposed language suggested in the Procedural Guidance. *Id.* at 7.

D. OPT OUTS.

The Notice advises class members that they can opt out by sending a written request to the administrator. It also advises them of the consequences of opting out, and sets forth information required for identification purposes including name and the last four digits of the social security number. *Id.* at p. 5.

E. OBJECTIONS.

The Notice advises class members of the deadline to submit objections and provides that objections are to be sent to the Court. *Id.* at p. 6.

F. SERVICE AWARD.

Plaintiff Eric Wickham seeks a service award of \$7,500 for the extensive time and effort he contributed to this case, without which the \$1,275,000.00 Settlement would not exist. Setareh Decl. ¶ 27. Mr. Wickham responded to multiple sets of discovery requests throughout the case. *Id.* Mr. Wickham additionally provided substantial assistance to Class Counsel in developing the claims in this case, provided relevant documents and discussed the pending settlement with Plaintiff's counsel along with being available by phone the date of mediation. *Id.*

G. CLASS ACTION FAIRNESS ACT (CAFA) AND SIMILAR REQUIREMENTS.

Defendant's counsel represents that Defendant will comply with CAFA and handle providing CAFA notices.

H. COMPARABLE OUTCOME.

A comparable settlement to the instant one is *Schofield v. Delta Air Lines, Inc.*, 2019 WL 955288 (N.D. Cal. 2019), which involved similar FCRA claims. However, that settlement occurred before the United States Supreme Court held that under the FCRA, "[e]very class member must have Article III standing in order to recover individual damages." *TransUnion v.*

1 *Ramirez*, 141 S.Ct. 2190, 2208 (2021) (emphasis added). The Court also reaffirmed its holding in
 2 a prior FCRA case, *Spokeo, Inc. v. Robins*, 578 U.S. 330 (2016), that a plaintiff can only rely on a
 3 statutory violation to satisfy Article III by demonstrating the violation caused a “concrete” “injury-
 4 in-fact.” *TransUnion*, 141 S.Ct. at 2205; *see also Spokeo, Inc.*, 578 U.S. at 340-41 (a “concrete”
 5 injury is “real, and not abstract”). Thus, *Delta* involved much less risk at the time of settlement.
 6 The *Delta* settlement involved a total settlement fund of \$2.3 million for approximately 44,100
 7 class members. *Delta*, 2019 WL 955288, at *1. In *Delta*, the gross settlement amount per class
 8 member was \$52.15 (\$2.3 million / 44,100.) The gross settlement amount per class member in this
 9 settlement is \$43.03 (\$1.275 million / 29,628), which is slightly lower than the gross settlement
 10 amount per class member in *Delta*. However, given unfavorable developments in case law on this
 11 issue which increased the risk of the Court denying certification, this is an excellent result for the
 12 class.

13 I. ELECTRONIC VERSIONS.

14 Upon filing of this motion, Class Counsel will submit Word versions of the Proposed
 15 Order and Settlement Notice.

16 J. OVERLAPPING CASES.

17 Schenker’s counsel represents that they will comply with this requirement.

18 VIII. THE COURT SHOULD CERTIFY THE SETTLEMENT CLASS, AND APPOINT 19 PLAINTIFF AND CLASS COUNSEL TO REPRESENT THEM

20 A. THE CLASS SHOULD BE CONDITIONALLY CERTIFIED FOR 21 PURPOSES OF SETTLEMENT

22 1. Standard for Conditional Class Certification Upon Settlement

23 Parties seeking class certification for settlement purposes must still generally satisfy the
 24 requirements of Federal Rule of Civil Procedure 23. *Amchem Prods., Inc. v. Windsor*, 521 U.S.
 25 591, 620 (1997). To maintain a class action under Rule 23(a), a plaintiff must demonstrate: (1)
 26 numerosity: the class is so numerous that joinder of all members is impracticable, (2) adequacy of
 27 representation: the representative parties will fairly and adequately protect the interests of the
 28 class, (3) typicality: the claims or defenses of the representative parties are typical of the claims or

1 defenses of the class, and (4) commonality: there are questions of law or fact common to the class.
 2 In addition to these requirements, a plaintiff must satisfy one of the Rule 23(b) prongs to maintain
 3 a class action. Under Rule 23(b)(3), the plaintiff must prove: “the questions of law or fact common
 4 to class members predominate over any questions affecting only individual members, and that a
 5 class action is superior to other available methods for fairly and efficiently adjudicating the
 6 controversy.” However, in the context of settlement, the Court “need not inquire whether the case,
 7 if tried, would present intractable management problems . . . for the proposal is that there be no
 8 trial.” *Amchem supra* at 620.

9 **2. Numerosity**

10 To satisfy the numerosity requirement under Rule 23(a)(1), the class must be “so numerous
 11 that joinder of all members is impracticable”. *Parkinson v. Hyundai Motor Am.*, 258 F.R.D. 580,
 12 588 (C.D. Cal. 2008). No specified number of members of class is needed to maintain a class action.
 13 *Cypress v. Newport News General and Nonsectarian Hospital Ass’n*, 375 F.2d 648 (4th Cir. 1967).
 14 Numerosity is generally presumed for purposes of class action certification when the proposed class
 15 would have at least 40 members. *Lapin v. Goldman Sachs & Co.*, 254 F.R.D. 168 (S.D.N.Y. 2008).

16 Here, the estimated count of approximately 29,628 Settlement Class Members satisfies the
 17 numerosity requirement. Settlement, ¶ 1.5.

18 **3. Adequacy of Representation**

19 To meet the adequacy of representation requirement in Rule 23(a)(4), Plaintiff must show:
 20 “(1) that the putative named plaintiff has the ability and the incentive to represent the claims of the
 21 class vigorously, (2) that he or she has obtained adequate counsel, and (3) that there is no conflict
 22 between the individual’s claims and those asserted on behalf of the class.” *Fry*, 198 F.R.D. at 469.
 23 Plaintiff has the same interests as the Settlement Class, there is no conflict between Plaintiff’s claims
 24 and those of the other Class Members, and Plaintiff is represented by experienced and competent
 25 counsel who have substantial experience in litigating wage-and-hour and FCRA class actions and who
 26 have no known conflict of interest with absent Settlement Class Members. Setareh Decl., ¶¶ 35-38.

27 **4. Typicality**

1 Rule 23(a) likewise requires that “the claims or defenses of the representative parties are
 2 typical of the claims or defenses of the class.” Fed. R. Civ. P. 23(a)(3). “Under the rule’s
 3 permissive standards, representative claims are ‘typical’ if they are reasonably coextensive with those
 4 of absent Class Members; they need not be substantially identical.” *Hanlon*, 150 F.3d at 1020. Here,
 5 Plaintiff’s claims are essentially identical to all other applicants for employment in the United States as
 6 described in the class provided in the Settlement, as each received a substantively similar disclosure
 7 and authorization form. Setareh Decl., ¶ 22.

8 **5. Commonality**

9 Rule 23(a) requires “questions of law or fact common to the class.” Fed. R. Civ. P. 23(a)(2).
 10 The commonality requirement has been construed permissively; not all questions of law and fact need
 11 to be common. *Hanlon*, 150 F.3d at 1019. Here, Plaintiff’s claims involve common questions of both
 12 fact and law regarding Defendant’s alleged failure to abide by the Fair Credit Reporting Act, including
 13 whether or not the disclosure and authorizations in use during the Class Period were clear and
 14 conspicuous. Setareh Decl., ¶¶ 23-24.

15 **6. Predominance and Superiority**

16 In addition to demonstrating the four prerequisites of Rule 23(a), class certification requires a
 17 showing that certification for settlement purposes is proper under one of the three requirements of Rule
 18 23(b). Here, “questions of law or fact common to class members predominate over any questions
 19 affecting only individual members, and...a class action is superior to other available methods for fairly
 20 and efficiently adjudication of the controversy.” Fed. R. Civ. P. 23(b)(3). Setareh Decl., ¶¶ 24-26. For
 21 settlement purposes common issues regarding the legality of Schenker’s background check
 22 practices predominate over any individualized issues. And, given the small amount of recovery
 23 expected in any individual claims (with only a maximum of \$1,000 in statutory damages being
 24 available pursuant to 15 U.S.C. § 1681 *et seq.*) class treatment is plainly superior to individual
 25 adjudication.

26 **7. Plaintiff has Article III Standing and the Court Can Grant Class Certification**

27 The Court expressed concerns at the hearing about granting conditional class certification
 28 based on the issue of whether class members are required to establish Article III standing. The

1 Court specifically referenced the then-pending Supreme Court case *Laboratory Corporation of*
 2 *America Holdings, DBA LabCorp, v. Davis, et al.*, 605 U. S. ____ (2025). Since the Court’s Order,
 3 the Supreme Court dismissed the writ of certiorari as improvidently granted in *LabCorp*.

4 Plaintiff has Article III standing here. During the hearing on March 6, 2025, the Court
 5 suggested as much. The Ninth Circuit has found that there is “a concrete injury when applicants
 6 are deprived of their ability to meaningfully authorize the credit check.” *Syed v. M-I LLC*, 853
 7 F.3d 492, 499 (9th Cir. 2017) (citations omitted). In *Spokeo, Inc. v. Robins*, 578 U.S. 330 (2016),
 8 the Supreme Court additionally held that a plaintiff can only rely on a statutory violation to satisfy
 9 Article III by demonstrating the violation caused a “concrete” “injury-in-fact.” Here, Plaintiff’s
 10 amended complaint does just this, alleging that Plaintiff was confused and would not have
 11 otherwise authorized Defendants to obtain a background check had he understood it. See Second
 12 Amended Complaint (“SAC”) at ¶ 25.

13 The U.S. Supreme Court has held an Article III “case or controversy” exists when one
 14 plaintiff has standing. *See, e.g., Horne v. Flores*, 557 U.S. 433 at 446–47 (2009)(“[W]e have at
 15 least one individual plaintiff who has demonstrated standing Because of the presence of this
 16 plaintiff, we need not consider whether the other individual and corporate plaintiffs have standing
 17 to maintain the suit.” (quoting *Vill. of Arlington Heights v. Metropolitan Housing Development*
 18 *Corp.*, 429 U.S. 252, at 264 & n.9 (1977))). The same principles that apply to individual claims
 19 apply to class claims, which, “like traditional joinder, ... leaves the parties’ legal rights and duties
 20 intact and the rules of decision unchanged.” *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins.*
 21 *Co.*, 559 U.S. 393, 408 (2010) (plurality opinion).

22 Whether a class contains uninjured class members does not defeat conditional class
 23 certification. *See Bouaphakeo v. Tyson Foods, Inc.*, 593 F. App’x 578, 585 (8th Cir. 2014)
 24 (opinion of Benton, J., respecting the denial of rehearing en banc) (“The failure of some
 25 employees to demonstrate damages goes to the merits, not jurisdiction.”), *aff’d*, 577 U.S. 442
 26 (2016). Jurisdiction “is not defeated” by a plaintiff’s inability to demonstrate that he can “actually
 27 recover.” *Bell v. Hood*, 327 U.S. 678, 682 (1946); *see Warth v. Seldin*, 422 U.S. 490, 498 (1975).
 28 Here, as noted above, Plaintiff has Article III standing. As a result, the Court can conditionally

1 certify a Settlement Class without determining whether Article III standing exists as to each
2 member of the Settlement Class.

3 Furthermore, the predominance analysis is relaxed for conditional certification of a class
4 following a settlement. In *In re Hyundai and Kia Fuel Economy Litig.*, 926 F.3d 539 (9th Cir. 2019)
5 the Ninth Circuit held that settlement is relevant to whether the predominance inquiry is met:

6 The criteria for class certification are applied differently in litigation classes and
7 settlement classes. In deciding whether to certify a litigation class, a district court
8 must be concerned with manageability at trial. However, such manageability is not
a concern in certifying a settlement class where, by definition, there will be no trial.

9 *Id.*, at 556-557. This was echoed in other cases in this district following *Hyundai*. See
10 *Suarez v. Bank of America, N.A.*, 2023 WL 5837495 (N.D. Cal. 2023) (“The court’s previous
11 denial of class certification does not change this analysis. *Harrison*, 2021 WL 5507175, at *5.
12 Certifying a Rule 23(b)(3) class for settlement purposes does not raise the same manageability
13 issues that certifying a litigation class does.”) Here, similarly, the parties have come to a
14 resolution, and there will be no trial. Therefore, any manageability concerns previously raised by
15 Defendants in opposition to class certification are moot, considering there will be no trial. As such,
16 because Plaintiff has Article III standing, the Court should grant conditional certification of the
17 Settlement Class.

18 **8. Alternatively, if the Court Finds Plaintiff Lacks Article III Standing, It**
19 **Must Remand this Action to State Court**

20 “If at any time before final judgment it appears that the district court lacks subject matter
21 jurisdiction, the case shall be remanded.” 28 U.S.C. § 1447(c); *see also Polo v. Innoventions*
22 *International, LLC*, 833 F.3d 1193 (9th Cir. 2016). Lack of subject matter jurisdiction is never
23 waived and may be raised by either party or the court at any time – even for the first time on
appeal. *Henderson ex rel. Henderson v. Shinseki* 562 U.S. 428, at 434 (2011).

24 The California Supreme Court has made clear that standing is not a jurisdictional
25 prerequisite: “Unlike the federal Constitution, our state Constitution has no case or controversy
26 requirement imposing an independent jurisdictional limitation on our standing doctrine.”
27 *Weatherford v. City of San Rafael* (2017) 2 Cal.5th 1241, 1247-48. Moreover, the California
28 Supreme Court has held that there is no “case or controversy” requirement in the California

1 Constitution, unlike Article III of the United States Constitution. *Grosset v. Wenaas*, 42 Cal.4th
2 1100, n.13 (2008) (citing *Gollust v. Mendell*, 501 U.S. 115, 125-26 (1991)); see also *Jasmine*
3 *Networks, Inc. v. Superior Court*, 180 Cal.App.4th 980 (2009). Not only that, the United States
4 Supreme Court has held that state courts are not bound by Article III, even when they decide
5 questions of federal law. *Asarco Inc. v. Kadish*, 490 U.S. 605 (1989).

6 For these reasons, if this Court is not convinced that Plaintiff has established Article III
7 standing to maintain this action in federal court, then it must remand this action back to state court
8 where the justiciability requirements are more lenient. 28 U.S.C. § 1447(c).

9 **IX. CONCLUSION**

10 For the reasons set forth above, Plaintiff respectfully requests that the Court grant the motion
11 for preliminary approval in its entirety.

12
13
14 DATED: August 6, 2025

SETAREH LAW GROUP

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